

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Margaret J. Tilley,

Complainant,

PROBABLE CAUSE
ORDER

vs.

James Swift,

Respondent.

The above-entitled matter came on for a probable cause hearing as provided by Minnesota Statute § 211B.34, before Administrative Law Judge Bruce H. Johnson on October 7, 2004, to consider a complaint filed by Margaret Tilley on October 4, 2004. The hearing was held by telephone, starting at approximately 9:30 a.m.

Alan Weinblatt, Weinblatt & Gaylord, PLC, Suite 300 Kellogg Square, 111 East Kellogg Boulevard, St. Paul, MN 55101, represented Ms. Tilley ("Complainant"). James Swift ("Respondent") participated on his own behalf without counsel.

During the telephone conference, the Complainant and Respondent gave sworn testimony, and the record was supplemented with one exhibit, Exhibit 1. The parties agreed that, in the event that an evidentiary hearing was required, there was no additional testimony to be offered and, with the exception of Respondent's copy of his questionnaire response, the record was complete.

Based upon the record and all of the proceedings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Margaret J. Tilley is an incumbent who is seeking re-election as a member of the Eagan City Council. James Swift is challenging Ms. Tilley for her seat on the Council in the upcoming November 2nd election.^[1]

2. In addition to her position as an Eagan City Council Member, Ms. Tilley is the Chair of the Minnesota Valley Transit Authority (MVTA) Board.^[2]

3. In 2003, the MVTA was looking for property on which to build a bus garage. The MVTA eventually decided to build the garage on a parcel of property owned by the Metropolitan Council. A parcel of land owned by Eagan resident Mrs. Betty Adelman adjoined that property. Mrs. Adelman is approximately 67-years-old, and maintains a home and a vegetable stand on that property. The MVTA then attempted to purchase Mrs. Adelman's property, to add it to the Metropolitan Council property in order to have more room for the buses to maneuver in and out of the garage. The MVTA arranged for two appraisals of Mrs. Adelman's property to be made, and subsequently offered her a sum of money for the purchase of her property.

Mrs. Adelman turned down the MVTA's offer. Thereafter, the Metropolitan Council began the process of condemning Mrs. Adelman's property by exercising its power of eminent domain.^[3] But after public criticism, the Metropolitan Council discontinued pursuing eminent domain proceedings.^[4]

4. Sometime in May or June of 2004, Cyndee Fields, another Eagan City Council member, made a motion to the City Council that the Council accept a resolution submitted by "GLBT Pride/Twin Cities" proclaiming June to be Gay, Lesbian, Bisexual, Transgender (GLBT) Pride Celebration Month. The resolution passed on a vote of four to zero. Ms. Tilley was among those Council Members voting in favor of the resolution.^[5]

5. On other occasions, the Eagan City Council has approved resolutions recognizing breast cancer awareness and other civic causes.^[6]

6. Sometime in September of 2004, the *Pioneer Press* mailed questionnaires to political candidates, including Ms. Tilley and Mr. Swift.^[7]

7. Mr. Swift submitted to the *Pioneer Press* a typewritten response to the questionnaire, which he completed himself. Mr. Swift's purpose, in answering the questionnaire, was to cast himself in a favorable light with voters and Ms. Tilley in an unfavorable light, in order to do well in the upcoming election. Mr. Swift kept a copy of his written response for his own records.^[8]

8. On or about September 29, 2004, Laura Yuen, a reporter with the *Pioneer Press*, contacted Ms. Tilley by telephone. Ms. Yuen told Ms. Tilley that she had received Mr. Swift's response to the questionnaire and that he had identified two matters that he opposed and that he claimed Ms. Tilley had supported. According to Ms. Yuen's recitation of Mr. Swift's questionnaire response, Mr. Swift wrote that Ms. Tilley "supported: (1) proclaiming June to be GLBT month in Eagan; and (2) attempting to condemn the land of Mrs. Adelman, a 67-year-old grandmother on dialysis, to build a garage for the MVTA."^[9]

9. An article written by Ms. Yuen appeared in the *Pioneer Press'* Dakota County edition on Friday, October 1, 2004. In the article, Mr. Swift is quoted as criticizing the Eagan City Council for declaring June to be Gay, Lesbian, Bisexual, Transgender Pride Celebration month. In addition, the article states:

"Swift is also challenging Tilley's role as chairwoman of the Minnesota Valley Transit Authority. Last year, the Metropolitan Council was on the cusp of condemning an Eagan woman's home and vegetable stand to make room for an MVTA bus garage. After a public outcry, the Met Council called off the eminent-domain proceedings."^[10]

10. On October 4, 2004, Ms. Tilley filed a Complaint with the Office of Administrative Hearings alleging that Mr. Swift violated Minn. Stat. § 211B.06 by making false statements about her conduct and personal and political character with the intent to defeat her candidacy. Specifically, Ms. Tilley alleges that Mr. Swift falsely stated that

she proclaimed June 2004 to be GLBT month, and that she attempted to condemn the land of Mrs. Adelman.

11. On October 5, 2004, the undersigned Administrative Law Judge determined that the Complaint set forth prima facie violations of Minn. Stat. § 211B.06, and scheduled the matter for a probable cause hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction to consider this matter pursuant to Minn. Stat. § 211B.34.

2. The test of probable cause is whether the evidence worthy of consideration brings the charge against the Respondent within “reasonable probability.”^[11]

3. “Campaign material” means “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by news media.”^[12]

4. There is probable cause to believe that Mr. Swift’s written response to the *Pioneer Press* questionnaire is “campaign material.”

5. Minn. Stat. § 211B.06, subdivision 1, provides, in part, as follows:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

6. There is no probable cause to believe that Mr. Swift violated Minn. Stat. § 211B.06 by stating in his written questionnaire response to the *Pioneer Press* that Ms. Tilley supported the resolution proclaiming June 2004 to be “Gay, Lesbian, Bisexual, Transgender Pride Celebration Month.”

7. There is probable cause to believe that Respondent violated Minn. Stat. § 211B.06 by stating in his written questionnaire response submitted to the *Pioneer Press* that Ms. Tilley supported an attempt by the Metropolitan Council to condemn the land of a 67-year-old Eagan resident.

Based on the Findings of Fact and Conclusions of Law, and for the reasons set forth in the Memorandum, attached hereto and incorporated herein:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is no probable cause to believe that Respondent violated Minn. Stat. § 211B.06 by stating that Ms. Tilley supported a resolution proclaiming June 2004 to be "Gay, Lesbian, Bisexual, Transgender Pride Celebration Month."
2. There is probable cause to believe that Respondent violated Minn. Stat. § 211B.06 by stating that Ms. Tilley supported an attempt by the Metropolitan Council to condemn the land of a 67-year-old Eagan resident.
3. This matter is referred to the Chief Administrative Law Judge for assignment of a three-judge panel to conduct an evidentiary hearing.

Dated: October 12, 2004

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statute § 211B.34, subdivision 3 provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under section 211B.35 within five business days after granting the petition.

MEMORANDUM

This proceeding involves a complaint made by Margaret J. Tilley, an incumbent who is seeking re-election as a member of the Eagan City Council, against James Swift, who is one of her opponents in the upcoming November 2nd general election. Ms. Tilley alleges that Mr. Swift violated Minn. Stat. § 211B.06, subd. 1, by submitting a written candidate questionnaire to the *Pioneer Press* newspaper that contained false statements about Ms. Tilley's involvement in two matters of public business. She further alleges that, based on the information that Mr. Swift had submitted, the *Pioneer Press* published an article on October 1, 2004, that also contained false statements about Ms. Tilley's involvement in those two matters.

Ms. Tilley first alleges that Mr. Swift falsely stated in the questionnaire that she had supported a resolution by the Eagan City Council proclaiming last June to be “Gay Lesbian Bisexual Transgender Pride Celebration Month.” But at the probable cause hearing, Ms. Tilley testified that she had, in fact, voted for the resolution, along with three other council members. She suggests that her vote for the resolution was not an expression of support because another council member introduced the resolution and because there was confusion about the effect of what she had voted for. One of the primary senses of the verb “support” is “to argue or vote for.”^[13] Although Ms. Tilley may not have argued for passage of the resolution, she clearly voted for it. And an ordinary speaker of the English language would therefore be justified in concluding that Ms. Tilley had supported the resolution, whatever the underlying circumstances might have been. In short, the ALJ finds that there is not probable cause to believe that Mr. Swift violated Minn. Stat. § 211B.06, subd. 1, by stating that Ms. Tilley had supported the resolution in question.

Ms. Tilley’s second claim is that Mr. Swift falsely stated in the questionnaire that, as chairwoman of the Minnesota Valley Transit Authority (MVTA), Ms. Tilley had supported an attempt by the Metropolitan Council to condemn a parcel of real property on which was located the home and vegetable stand of Betty Adelman, a 67-year-old Eagan resident.^[14] First of all, the news story that apparently resulted in part from what was in the candidate questionnaire simply stated:

“Swift is also challenging Tilley’s role as chairwoman of the Minnesota Valley Transit Authority. Last year, the Metropolitan Council was on the cusp of condemning an Eagan woman’s home and vegetable stand to make room for a MVTA bus garage. After a public outcry, the Met Council called off the eminent domain proceedings.”

At the probable cause hearing, Ms. Tilley could point to nothing in that news item that wasn’t ostensibly true. What she argued was that associating her with actions that the Metropolitan Council may have taken created negative connotations that might negatively influence voter attitudes toward her. Minn. Stat. § 211B.06, subd. 1, prohibits false statements. It does not speak to any negative connotations that might be drawn from facially true statements. Additionally, when Minn. Stat. § 211B.01, subd. 2, defines “campaign material,” it specifically excepts “news items or editorial comments by the news media.” In short, even if the *Pioneer Press*’ news item of October 1, 2004,^[15] had contained false statements about Ms. Tilley’s involvement with the Metropolitan Council’s proposed acquisition of Ms. Adelman’s property, it could not have supported a complaint of a violation of Minn. Stat. § 211B.06, subd. 1.

What remains to be considered is the allegation that Mr. Swift made false statements about Ms. Tilley’s involvement in any proposal to acquire Ms. Adelman’s property in the candidate questionnaire that Mr. Swift submitted to the *Pioneer Press*. The threshold question is whether completed questionnaires submitted by candidates to newspapers are “campaign material” within the meaning of Minn. Stat. § 211B.01, subd. 2, and § 211B.06, subd. 1. Mr. Swift argues that even if the questionnaire meets the definition of “campaign material” in Minn. Stat. § 211B.01, subd. 2, it fails as “campaign material” under Minn. Stat. § 211B.06, subd. 1, because that latter statute refers to “paid political advertising or campaign material.” Mr. Swift contends that the modifier “paid”

refers to both “political advertising” and “campaign material.” He argues that because no payment was made to anyone in connection with his submission of the questionnaire to the newspaper, the questionnaire is not covered by the prohibition in Minn. Stat. § 211B.06, subd. 1. The ALJ disagrees. A traditional canon of construction is that modifiers in statutes normally refer only to the most proximate noun in the text, unless contrary to the apparent legislative intent derived from the sense of the entire statute.^[16] In this case the noun most proximate to the modifier “paid” is “advertising.” And here, legislative intent also supports the construction that “paid” only refers to “advertising.” The clear purpose of Minn. Stat § 211B.06, subd. 1, is to prevent candidates for office from disseminating false statements about their opponents. Mr. Swift’s interpretation would limit that prohibition to situations where the material containing the false statements has been paid for, and it would allow candidates to disseminate false statements about their opponents with impunity so long as the materials containing the statements were not purchased. Such a result would be contrary to the legislature’s clear intent.

The final question is whether completed candidate questionnaires solicited by newspapers and returned to them by candidates are covered by Minn. Stat. § 211B.01, subd. 2, and § 211B.06, subd. 1. Minn. Stat. § 211B.01, subd. 2, defines “campaign materials”:

Subd. 2. **Campaign material.** “Campaign material” means any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.

The definition requires three tests to be met. The item or items in question must be “literature, publication[s], or material.” The candidate questionnaire here probably fails as “literature” or a “publication,”^[17] but it probably falls within the rather broad category of “material.” Second, Mr. Swift conceded in his testimony that what he typed into the candidate questionnaire was done for “the purpose of influencing voting at a primary or other election.” But the statute also requires that the material be “disseminated.” So a legal question that this case presents is whether the term “disseminated,” as used in the statute, includes return of a completed candidate questionnaire from the candidate to the newspaper that requested it.

Ms. Tilley testified that a reporter for the Pioneer Press quoted portions of Mr. Swift’s candidate questionnaire to her over the telephone. One statement that the reporter attributed to Mr. Swift was to the effect that Ms. Tilley had attempted to condemn Ms. Adelman’s property. Ms. Tilley alleges that that statement was false, and that Mr. Swift knowingly or recklessly made it in his candidate questionnaire. At the probable cause hearing, Mr. Swift specifically denied making that statement in the questionnaire. So, the nature of any statements Mr. Swift made in the questionnaire about Ms. Tilley’s involvement with a proposed acquisition of the Adelman property is in dispute, as is the truth or falsity of any such statements. In summary, the second violation of Minn. Stat. § 211B.06, subd. 1, that Ms. Tilley alleges was committed involves substantial and disputed questions of law and fact.^[18] The ALJ therefore finds

that there is probable cause to believe that the second violation of the law alleged in Ms. Tilley's complaint occurred.

Two things that occurred at the probable cause hearing will affect the conduct of the evidentiary hearing on the second charge. First, the parties stipulated on the record that the panel appointed by the Chief Administrative Law Judge could decide the merits of the case based on the testimony elicited at the probable cause hearing and the exhibit introduced at that proceeding,^[19] with one exception. Mr. Swift declined to voluntarily produce his copy of the candidate questionnaire he had submitted to the *Pioneer Press*. And Ms. Tilley sought leave to keep the record of the probable cause hearing open until that document could be subpoenaed. Since the ALJ has made a finding of probable cause with respect to the charge to which that document relates, it is unnecessary to keep the record of this proceeding open. If Ms. Tilley wishes to obtain a subpoena to obtain a copy of the questionnaire in question in order to introduce it as evidence at the evidentiary hearing, she should be given that opportunity.

B.H.J.

^[1] Testimony of Tilley and Swift.

^[2] Testimony of Tilley; Ex. 1.

^[3] The MVTA does not have the power of eminent domain. (Tilley's sworn statement in complaint.)

^[4] Testimony of Tilley; Ex. 1.

^[5] Testimony of Tilley; Ex. 1.

^[6] Ex. 1.

^[7] Testimony of Tilley and Swift.

^[8] Testimony of Swift.

^[9] Testimony of Tilley.

^[10] Ex. 1.

^[11] Gerstein v. Pugh, 420 U.S. 103 (1975). See also, In re Schultz, 375 N.W.2d 509, 513 (Minn. App. 1985) (finding a similarly articulated test of probable cause in a criminal context to be useful in a license disciplinary proceeding.)

^[12] Minn. Stat. § 211B.01, subd. 2.

^[13] *Merriam-Webster Online Dictionary*, 2004 ed.

^[14] Complaint and Exhibit 1.

^[15] Exhibit 1.

^[16] This canon is normally expressed as the "Last Antecedent Rule." But the same logic applies when the modifier precedes, rather than follows, a series of nouns.

^[17] The questionnaire itself never having been published.

^[18] The ALJ has accepted testimonial evidence of the contents of an unavailable document as a sufficient basis to establish probable cause. But the ALJ expresses no opinion of the sufficiency of that evidence if the same question arises in the evidentiary hearing.

^[19] Exhibit 1.